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Broad Statutory Language Is Not Ambiguous: The Americans With Disabilities Act Applies in State Prisons

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BROAD STATUTORY LANGUAGE IS NOT AMBIGUOUS: THE AMERICANS WITH DISABILITIES ACT APPLIES IN STATE PRISONS

I. INTRODUCTION

It is not uncommon for disabled prisoners to allege discrimination in American prisons today, nor is the number of disabled prisoners few.[1] These prisoners allege that they are denied the opportunity to participate in work release[2] and rehabilitation programs,[3] and that they are denied access to prison facilities, such as dining halls and libraries.[4] In addition, disabled prisoners claim they are not being provided with satisfactory medical attention, hygiene,[5] and emergency evacuation plans.[6]

When a state prison elects to provide certain services to its prisoners, it has presumably decided that providing these programs is either neces-

1. Few studies have been conducted to determine the percentage of inmates with disabilities. *See* Elaine Gardner, *The Legal Rights of Inmates with Physical Disabilities*, 14 ST. LOUIS U. PUB. L. REV. 175, 176 (1994). Furthermore, state participation in the limited studies conducted has been lacking. *See id.* Thus, it is difficult to ascertain the percentage of prisoners that are disabled. *See id.*

2. *See* Amos v. Maryland Dep't of Pub. Safety and Correctional Services, 126 F.3d 589, 590-91 (4th Cir. 1997). In *Amos*, thirteen disabled Maryland State prisoners alleged they were denied participation in work release and pre-release programs offered at the prison because of their disabilities. *See id.* They maintained that the denial of access to such work related programs resulted in longer prison sentences. *See id.*

3. *See* Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 483 (7th Cir. 1997). A former disabled state prisoner claimed he had been denied access to educational programs because of his disability. *See id. See also* Armstrong v. Wilson, 124 F.3d 1019, 1021 (9th Cir. 1997). In *Armstrong*, disabled prison inmates and parolees filed a class action lawsuit alleging, among other things, that California state officials working in their official capacities denied inmates access to vocational programs because of the prisoners' disabilities. The prisoners also contended that certain prisoners were denied sentence reduction credits due to improper placement in educational and work programs. *See id.*

4. *See Amos*, 126 F.3d at 590-91; *Armstrong*, 124 F.3d at 1021. The disabled prisoners in *Amos* also alleged that they were denied equal access to certain prison facilities, such as the bathrooms, because of their disabilities. *See Amos*, 126 F.3d at 590-91.

5. *See Amos*, 126 F.3d at 590-91.

6. *See Armstrong*, 124 F.3d at 1021.

sary, for example, medical assistance, or justified, such as religious and educational services. It is also likely that the state prison, in justifying a program, considers the fact that most prisoners are ultimately released, and that society thereby benefits from the service. Consequently, if a prison facility denies certain prisoners access to these programs due to their disabilities, both the prisoner and society may be harmed. Rehabilitation of these prisoners is less likely, and therefore, they are more likely to repeat their crimes once released. In addition, the prisoners are more dependent on the federal and state governments for support.

As a society, we do not tolerate substandard treatment of individuals because they are disabled. However, within the confines of a prison, disabled prisoners generally lack the means to help prevent and remedy discrimination. Without adequate protection, particularly in light of the closed nature of prisons, and the often unsympathetic attitude that society has toward prisoners, the actions of prison officials may go unchecked, leading to a greater likelihood of discrimination against disabled prisoners.

The Americans with Disabilities Act of 1990 (ADA)[7] enacted a congressional policy that, as a society, we will not tolerate discrimination against the disabled. Over the last two years, there has been a debate among the federal courts regarding whether disabled prisoners should receive the same protection under the ADA that the statute affords to other disabled individuals. Five United States Courts of Appeals have heard this question.[8] Three courts held that the Act does apply; two that it does not. This issue was recently resolved by the Supreme Court in *Pennsylvania Department of Corrections v. Yeskey*,[9] in which a unanimous court concluded that the ADA covers inmates in state prisons.

The core issue leading to the Supreme Court's ruling in *Yeskey* was whether the broad provisions of the ADA unambiguously evidenced Congress' intent to apply the Act to inmates in state prisons. Because the administration of state prisons has historically been a power reserved

7. *See* 42 U.S.C. §§ 12101-12213 (1994).

8. *See Amos*, 126 F.3d at 591 (holding that the ADA does not apply to inmates in state prisons); *Armstrong*, 124 F.3d at 1023 (holding that the ADA applies to inmates in state prisons); Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168, 174 (3d Cir. 1997) (holding that the ADA applies to inmates in state prisons); *Crawford*, 115 F.3d at 486 (holding that the ADA applies to inmates in state prisons); White v. Colorado, 82 F.3d 364, 367 (10th Cir. 1996) (holding that the ADA does not apply to inmates in state prisons).

9. 118 S. Ct. 1952 (1998).

for the states,[10] the difference in opinions prior to *Yeskey* can be explained by the degree to which a court was concerned about protecting the balance of power between the federal government and the states. Due to the differences in opinion as to whether the ADA was ambiguous in its application to prisoners, the debate centered on whether the clear statement rule of statutory construction applied.

The clear statement rule is a rule of statutory construction that requires Congress to speak clearly in the text of a statute if it intends to apply it in a manner that would frustrate the traditional federal-state balance of power.[11] Where any ambiguity in the text exists, a court is to interpret the statute as preserving state control.[12] However, the parameters of the rule were not clear when the Circuit Courts were interpreting Title II. This was because the clear statement rule was only used to determine how a statute should be applied in one prior case, *Gregory v. Ashcroft*.[13]

The issue in *Gregory* was whether state appointed judges were covered under the Age Discrimination in Employment Act of 1967 (ADEA).[14] The Court determined that the ADEA was ambiguous on the question of whether state appointed judges fell within one of the exceptions in the statute.[15] Recognizing the federalism concerns implicated by applying the ADEA to state appointed judges, the Court applied the clear statement rule and concluded that Congress had not preempted the states' ability to mandate the qualifications of its judges.[16] The decision left two important issues unresolved: First, which state functions trigger use of the rule; second, how clear must the language be in order to interpret the statute as destroying state control. Both of these issues resurfaced in the debate over whether the ADA applies to state prisoners. The lack of guidance regarding the parameters of the clear statement rule led to the disparity among the ADA/state prisoner decisions of the Circuit Courts.

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10. *See* Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.").

11. *See* Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991).

12. *See id.*

13. 501 U.S. 452 (1991).

14. *See* 29 U.S.C. §§ 621-634 (1994).

15. *See Gregory*, 501 U.S. at 467.

16. *See id.*

In *Yeskey*, the Supreme Court applied the clear statement rule to the broad language of the ADA and concluded that the rule is "amply met."[17] One implication of this decision is disabled prisoners can currently establish a *prima facie* case of discrimination under the ADA. However, this decision also addressed the degree of clarity statutory language must have to satisfy the demands of the clear statement rule. According to the Court, broad statutory language in a federal statute is not ambiguous even when applied in a manner that preempts a core state function. The Court's decision in *Yeskey*, therefore, affords future courts with a greater understanding of the scope of the clear statement rule. In the future, this may ultimately lead to greater consistency among decisions involving congressional intent to preempt a core state function.

This Comment analyzes the issues presented in the debate over whether the ADA covers state correctional facilities and their prisoners. More specifically, this Comment discusses Title II, Subtitle A[18] of the ADA, which governs state and local government entities. Part II reviews the general purposes and provisions of the ADA. Part III reviews Title II of the ADA and its application to state prisoners. Part IV analyzes the debate among the Circuit Courts leading to the Supreme Court's decision in *Yeskey*. This part will specifically focus on the application of the clear statement rule. Part V discusses the *Yeskey* decision and Part VI discusses the implications of the Supreme Court's ruling.

II. THE ADA

A. Background and Purposes of the Act

President George Bush signed the ADA into law on July 26, 1990. At that time, Congress estimated that forty-three million Americans were living with a disability, a figure that was likely to increase as the American population aged.[19] Congress also acknowledged that throughout history many disabled individuals have faced discrimination[20] and that such discrimination continues to be a "serious and pervasive social

17. Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1954 (1998).

18. *See* 42 U.S.C. §§ 12131-12134 (1994).

19. *See id.* § 12101(a)(1).

20. *See id.* § 12101(a)(2). Congress states that "historically, society has tended to isolate and segregate individuals with disabilities . . . ." *Id.*

problem."[21] Specifically, discrimination continues to exist in "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[22]

At the time President Bush signed the ADA into law, legislation at the state level was inadequate, and the existing federal anti-discrimination statute relating to disability, the Rehabilitation Act of 1973 (Rehabilitation Act),[23] only applied to entities receiving federal funding.[24] Therefore, not all entities were prohibited from discriminating against individuals with disabilities. Consequently, there was a need for a comprehensive federal statute to ensure the protection of all disabled individuals against discrimination. Congress enacted the ADA with this purpose in mind.[25] The statute attempts to remove obstacles facing disabled individuals in order to ensure that they have equal access to opportunities, participate fully in society, and enjoy more independent, self-sufficient lives.[26]

B. Overview of the Statute

The ADA prohibits a covered entity from discriminating against a

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21. *Id.*

22. *Id.* § 12101(a)(3).

23. 29 U.S.C. § 794 (1994).

24. For discussion of the Rehabilitation Act, see *infra* Part III subsection D.

25. The statute provides a statement of its purpose:

> to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id. § 12101(b).

26. *See id.* § 12101(a)(8). Congress described the goals of the ADA as: "[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . . ." *Id.* The ADA focuses on creating equality for the disabled by removing the artificial barriers that hinder their equality. *See* GARY PHELAN & JANET BOND ARTERTON, DISABILITY DISCRIMINATION IN THE WORKPLACE, 11 (1997). Thus, the goal of the ADA is to create a level playing field, rather than provide the disabled special protection. *See id.*

disabled individual on the basis of disability. There are five titles within the statute. Each title prohibits disability discrimination in specific settings: Title I[27] prohibits discrimination in employment;[28] Title II[29] prohibits discrimination by state and local governments in relation to public services and transportation;[30] Title III[31] prohibits discrimination by private entities providing public accommodation;[32] Title IV[33] prohibits discrimination by telecommunications providers and common carriers;[34] and Title V[35] contains general requirements.[36]

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27. *See* 42 U.S.C. §§ 12111-12117.

28. *See id.* § 12112. The prohibition against discrimination in Title I is: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* The title defines a "covered entity" as "an employer, employment agency, labor organization, or joint labor-management committee." *Id.* § 12111(2). An "employer" is defined as follows:

> [A] person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agency of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent such person.

Id. An "employee" is "an individual employed by an employer." *Id.* § 12111(4).

29. *See id.* §§ 12131-12134, 12141-12150, 12161-12165. Title II is divided into two subtitles, A and B. Subtitle A covers public services. *Id.* §§ 12131-34. Subtitle B covers public transportation. *Id.* §§ 12141-50, 12161-65. Any mention of Title II in the remainder of this Comment refers to subtitle A only.

30. See *infra* Part III, subsections A and B for an in-depth analysis of the provisions of Title II.

31. *See* 42 U.S.C. §§ 12181-12189.

32. *See id.* § 12182(a). The prohibition is that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *Id.* The definition of a "public accommodation" is found at 42 U.S.C. § 12181(7).

33. *See* 47 U.S.C. §§ 225, 711 (1995).

34. *See id.*

35. *See* 42 U.S.C. §§ 12201-12213.

36. Title V abrogates the states' Eleventh Amendment immunity. *See id.* § 12202. The title also contains an anti-retaliation clause and a prohibition against

An individual alleging a violation of the ADA must prove that he or she has a disability under the statute and was discriminated against on the basis of the disability.[37] Furthermore, an individual bringing suit under Titles I or II of the ADA must demonstrate that he or she is a "qualified individual."[38] There is no such requirement under Title III.[39] A covered entity must provide a disabled individual with reasonable accommodation to assist the individual in becoming "qualified."[40] However, there is no requirement for a covered entity to provide reasonable accommodation if to do so would cause undue hardship.[41]

Congress chose not to include particular requirements within the Act. Instead, Congress designated within each of the titles an agency responsible for promulgating regulations to implement the title.[42] Congress also

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the use of intimidation or coercion against a disabled individual exercising his or her rights under the Act. *See id.* § 12203.

37. "*Disability* means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." *Id.* § 12102(2). Title V of the ADA generally provides that a "disability" does not include "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs." *See id.* § 12211(b). In addition, homosexuality and bisexuality are not considered disabilities. *See id.* § 12211(a).

38. *See id.* §§ 12112, 12132. Title I defines a "qualified individual with a disability" as: "[A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). Title II defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities." *Id.* § 12131(2).

39. *See id.* § 12182(a).

40. *See* 29 C.F.R. § 1630.2(o) (1998) (Title I); 28 C.F.R. § 35.130(b)(7) (1998) (Title II).

41. *See* 42 U.S.C. § 12112(b)(5) (1994) (Title I); 28 C.F.R. § 35.130(b)(7) (1998) (Title II).

42. Congress designated the EEOC responsible for promulgating regulations implementing Title I of the Act. *See* 42 U.S.C. §§ 12116, 12111(1). The DOJ has the responsibility of implementing regulations under Title II, Subtitle A. *See id.* § 12134(a). Under Title II, Subtitle B, Title III and Title IV, the Secretary of Transportation issues regulations implementing the titles. *See id.* §§ 12143, 12164

stated that the ADA must be applied consistently with the Rehabilitation Act.[43]

A defendant charged with violating the ADA may raise several defenses. The defendant may produce evidence to rebut any of the *prima facie* elements of the plaintiff's case.[44] For example, the defendant may produce evidence that the plaintiff does not have a disability as defined under the ADA, or that the defendant had a legitimate, nondiscriminatory reason for taking the action in question. In addition, the defendant may offer evidence that no reasonable alternative existed to accommodate the individual's disability, and that without accommodation, the individual is not "qualified." Further, the entity may demonstrate that reasonable accommodation would have placed an "undue burden" on the defendant.

III. APPLICATION OF THE ADA TO STATE PRISONS AND PRISONERS

A. Title II and Disabled Prisoners

A disabled prisoner may allege a violation of any title of the ADA.[45] However, the majority of litigation brought by prisoners has been based on Title II since the title is directed at prohibiting discrimination by state and local government entities. To facilitate an understanding of the Circuit Courts' disagreement regarding Title II's coverage of state prisoners, it is important to understand: (1) what Congress was attempting to accomplish by enacting the ADA, and how Title II fits into that overall purpose; (2) the statutory language utilized in Title II; (3) the regulations promulgated to implement the ADA and the deference afforded to the administrative regulations; and (4) the relationship between Title II and Section 504 of the Rehabilitation Act.

B. Statutory Language of Title II

Prior to the enactment of the ADA, it was not uncommon for a state to

(authorizing regulations under Title II, Subtitle B), 12186(a)(1) (authorizing regulations under Title III), 225(d) (authorizing regulations under Title IV).

43. *See id.* § 12201(a).

44. This is true of legal claims generally where the plaintiff has the burden of persuasion as to the elements of the case.

45. For examples of how a disabled prisoner might bring a lawsuit under a provision of the ADA other than Title II, *see* Gardner, *supra* note 1, at 176-78.

deny disabled individuals access to non-federally funded public services because of the individual's disability.[46] Congress realized the ADA's goals of self-sufficiency and mainstreaming were less likely to be achieved without mandating access to these services. Therefore, Congress enacted Title II of the ADA to extend the Act's general prohibition against disability discrimination to state and local government.

Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[47] An individual alleging a violation of Title II has the *prima facie* burden of establishing that he or she (1) is a qualified individual, (2) has a disability, and (3) was subjected to prohibited discrimination by a public entity.[48]

Title II defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities."[49] A "public entity" includes "(A) any State or local government . . . (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government."[50] There is no further definition of a "qualified individual" or "public entity," and no express language including or exempting state correctional facilities or prisoners from the purview of the Act. In addition, the legislative history of the ADA is silent with regard to its application to state prisons or prisoners.

C. Department of Justice Regulations

Congress authorized the DOJ to promulgate regulations implementing Title II of the ADA.[51] As with other administrative regulations, the general rule is that regulations "should be accorded controlling weight unless [they are] 'arbitrary, capricious, or manifestly contrary to the statute.'"[52] The preambles to any regulations are afforded the same defer-

46. *See* 42 U.S.C. § 12101(a)(3).
47. *Id.* § 12132.
48. *See* Duffy v. Riveland, 98 F.3d 447, 455 (9th Cir. 1996).
49. 42 U.S.C. § 12131(2).
50. *Id.* § 12131(1).
51. *See id.* §§ 12134(a), 12206.
52. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,

ence.[53] The DOJ regulations clearly apply to state correctional facilities. The preamble and the regulations themselves contain at least two references to state prisons. The first reference states that the DOJ is the agency responsible for enforcing the ADA as it applies to "the administration of justice, including . . . correctional institutions . . . ."[54] The second reference is that "[a] public entity is not . . . required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except . . . where the individual is an inmate of a custodial or correctional institution."[55] Therefore, the DOJ construes its authority to include promulgating regulations that apply to state prisons.

D. Section 504 of the Rehabilitation Act

It was Congress' intent in enacting the ADA to expand the federal disability discrimination law to entities not covered by the Rehabilitation Act; namely, to entities not receiving federal funding. Congress directed that the ADA be applied consistently with the Rehabilitation Act.[56] Section 504 of the Rehabilitation Act states that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[57] Because many state

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515 U.S. 687 (1995).

53. The preamble is considered part of an agency's interpretation of the statute.

54. 28 C.F.R. § 35.190(b)(6) (1997).

55. *Id.* pt. 35, app. A, at 478.

56. *See* 42 U.S.C. § 12201(a) (1994).

57. 29 U.S.C. § 794(a) (1994). According to the United States Supreme Court, section 504 requires that programs receiving federal funding make reasonable accommodations to ensure that otherwise qualified individuals with a disability may have "meaningful access" to the programs. *See* Alexander v. Choate, 469 U.S. 287, 301 (1985). A plaintiff alleging a violation of the Rehabilitation Act must demonstrate in a *prima facie* case that he or she (1) is handicapped, (2) is otherwise qualified, (3) the program in dispute receives federal funds, and (4) the discrimination alleged is on the basis of his or her handicap. *See* Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1107 (9th Cir. 1987). The scope of Title II is broader than the Rehabilitation Act and, as a result, an individual bringing suit under the ADA generally has a less stringent burden because there is no requirement to prove receipt of federal funding in his or her *prima facie* case. However, in the context of state prisons, proof that the prison receives federal funds is not a difficult burden to meet, and therefore, many disabled prisoners al-

and local government entities receive federal funding, Section 504 is "materially identical"[58] to the provisions of Title II. Therefore, Section 504 serves as the model for determining how to read Title II.[59] As in the ADA, there is no specific statutory reference in Section 504 or in the legislative history of the Rehabilitation Act to state prisons or prisoners. However, the regulations promulgated by the DOJ set forth in Section 504 apply to correctional facilities.[60] The regulations define the term "program" as "the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, e.g., a police department or department of corrections."[61] The definition of the term "benefit" includes "provision of services, financial aid or disposition (i.e., treatment, handling, decision, sentencing, confinement, or other prescription of conduct)."[62]

Prior to the enactment of the ADA, case law interpreting Section 504's application to state prisoners was limited. Only three United States District Courts had addressed the issue.[63] All three cases held that Section 504 covered state prisons and their prisoners.

IV. THE DEBATE OVER APPLICATION OF TITLE II TO STATE PRISONS AND PRISONERS

A. Federalism Concerns and the Question of Ambiguity

1. Which rule of statutory construction applies?

Since the enactment of the ADA, several courts addressed whether

lege violations of both statutes.

58. Crawford v. Indiana Dep't of Corrections, 115 F.3d 483, 483 (7th Cir. 1997).

59. *See id.*

60. Congress authorized the DOJ to promulgate regulations implementing Section 504. *See* 29 U.S.C. § 794(a).

61. 28 C.F.R. § 42.540(h)(1996).

62. *Id.* § 42.540(j).

63. *See* Bonner v. Lewis, 857 F.2d 559, 564 (9th Cir. 1988) (holding that a disabled state inmate may raise a claim under section 504 of the Rehabilitation Act); Harris v. Thigpen, 727 F. Supp. 1564, 1582-83 (M.D. Ala. 1990), *aff'd*, 941 F.2d 1495, 1527 (11th Cir. 1991) (recognizing that disabled inmates may have a cause of action under the Rehabilitation Act); Sites v. McKenzie, 423 F. Supp. 1190, 1197 (N.D. W. Va. 1976) (holding that a disabled state inmate may raise a claim under section 504 of the Rehabilitation Act).

disabled prisoners have a cognizable cause of action under Title II of the statute. Initially, courts circumvented this issue by disposing of claims based on the defense of qualified immunity.[64] Recently, however, courts have been forced to definitively answer whether the Act applies.

In 1996 and 1997, five United States Courts of Appeals interpreted the provisions of Title II to determine whether the provisions cover state prisoners.[65] When interpreting a statute, a court generally looks to the plain language of the statute to determine its application.[66] The plain language controls unless it is (1) ambiguous, or (2) frustrates the drafters' intent.[67] If ambiguous, a court will typically resort to extrinsic sources for guidance on the interpretation of the statute. Two such sources include legislative history and administrative regulations. However, if application of a statute would permit Congress to upset the traditional federal-state balance of power, the clear statement rule of statutory construction[68] applies to interpret the ambiguity.[69] The rule requires Congress to make its intention to regulate in such a manner unmistakably clear in the text of the statute.[70] Therefore, courts must

64. Government officials working in their representative capacities can raise the defense of qualified immunity and have any claims against them dismissed where they can demonstrate that "their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1987).

65. *See* Amos v. Maryland Dep't of Pub. Safety and Correctional Services, 126 F.3d 589, 591 (4th Cir. 1997) (holding that the ADA does not apply to state correctional facilities); Armstrong v. Wilson, 124 F.3d 1019, 1023 (9th Cir. 1997) (reaffirming its prior holding that the ADA does apply to state correctional facilities); Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168, 174 (3rd Cir. 1997) (holding that the ADA does provide a cause of action to disabled state prisoners); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 486 (7th Cir. 1997) (holding that the ADA does apply to state prisons); White v. Colorado, 82 F.3d 364, 367 (10th Cir. 1996) (holding that the ADA does not apply to inmates in state prisons).

66. *See* Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute is its language, for 'if the intent is clear, that is the end of the matter.'") (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984)).

67. *See* Kelley v. E.I. DuPont de Nemours & Co., 17 F.3d 836, 842 (6th Cir. 1994).

68. The rule is also referred to as the plain statement rule. *See* Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1954 (1998).

69. *See* Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991).

70. *See id.*; Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985);

interpret any ambiguity within the four corners of the statute as preserving state control.[71] The policy behind the rule is that it "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[72]

In interpreting Title II, the Circuit Courts determined whether the Title unambiguously applies to inmates in state prisons. Because states traditionally manage their prisons, applying the ADA to state prisons frustrates the federal-state balance of power.[73] Thus, the difference in opinions as to whether Title II is ambiguous depended upon the degree of concern a court had about preserving federalism. Further, since the courts disagreed on the ambiguity of Title II, they reached different conclusions regarding the application of the clear statement rule. It is therefore, important to understand what the clear statement rule is, and how it has traditionally been applied.

2. The Clear Statement Rule

a. The 1980s

Clear statement rules are not new cannons of statutory construction.[74] They have been applied over the years in various contexts. However, the federalism-based canons have undergone significant changes over the last two decades. First, in 1981, in *Pennhurst State School and Hospital.*

Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

71. *See Gregory*, 501 U.S. at 460-61.

72. United States v. Bass, 404 U.S. 336, 349 (1971). The Supreme Court has also described the rationale as: "The plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our Constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

73. *See* Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973) (stating, "[I]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.").

74. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992) ("[M]any of the substantive cannons of statutory construction [including the clear statement rules] are directly inspired by the Constitution . . . ."). Authors Eskridge & Frickey provide an in-depth historical perspective on the use of clear statement rules from 1975-1991.

v. Halderman,[75] the Supreme Court created a clear statement rule to apply in situations where it is unclear whether Congress intended to place conditions on state acceptance of federal funds.[76] In *Pennhurst*, the Supreme Court recognized that "Congress may fix the terms on which it shall disburse federal money to the States."[77] However, the Court analogized legislation pursuant to the spending power to a contract. The federal government offers to disburse funds subject to certain conditions, and the States, in accepting the moneys, agree to be bound by the conditions.[78] Viewing the transaction as a "contract," the Supreme Court required voluntary and knowing acceptance of the terms on the part of the States.[79] In order to ensure knowing acceptance, the Supreme Court pronounced that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[80]

Second, the 1980s marked a dramatic change in the nature of the clear statement rule applied in Eleventh Amendment[81] immunity cases.[82] Prior to this time, any ambiguity regarding whether Congress intended to abrogate the States' Eleventh Amendment immunity from suit in federal courts was interpreted using a presumption.[83] It was presumed that Congress did not intend to abrogate the States' immunity; however, this presumption could be overcome by looking to statutory language and legislative history, among other things.[84] This framework changed in *Atascadero State Hospital v. Scanlon*.[85]

In *Atascadero*, the Supreme Court addressed whether Congress in-

75. 451 U.S. 1 (1981).

76. *See id.* at 17.

77. *Id.*

78. *See id.*

79. *See id.*

80. *Pennhurst*, 451 U.S. at 17. The issue is "whether Congress spoke so clearly that [a court] can fairly say that the State could make an informed choice." *Id.* at 24-25.

81. The Eleventh Amendment states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

82. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (holding that the Rehabilitation Act does not abrogate the states' Eleventh Amendment immunity).

83. *See* Eskridge & Frickey, *supra* note 74, at 621.

84. *See id.*

85. 473 U.S. 234 (1985).

tended to override the States' immunity under the Rehabilitation Act.[86] The Court acknowledged that Congress has the constitutional authority to do so.[87] Recognizing, however, that any abrogation frustrates the Constitutional federal-state balance of power,[88] the Court held that if Congress intends to abrogate the States' immunity, it must make "its intention unmistakably clear in the language of the statute."[89] Thus, in *Atascadero*, the Court began requiring a "clearer, more explicit statement from Congress in the text of the statute, without reference to legislative history, than prior clear statement rules have required."[90] The Supreme Court continues to require a stronger statement of intent in the text of a statute in Eleventh Amendment cases.[91]

This change occurred largely in response to the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*,[92] overruling its earlier decision in *National League of Cities v. Usery*.[93] In *National League of Cities*, the Supreme Court recognized that Congress may not regulate certain State activities under the Commerce Clause.[94] The Court set forth several conditions that must be met in order to determine when States are immune from regulation.[95] One condition was that Congress attempt to enforce legislation against a State in "areas of traditional governmental functions."[96] After the *National League of Cities* decision, courts had a difficult time applying the "traditional governmental functions" test as it was unclear which State functions were "traditional."[97]

In *Garcia*, the Court recognized the fact that the test had proven to be unworkable and concluded that the test was also contrary to notions of

86. *See id.* at 247.

87. *See id.* at 242.

88. *See id*; *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547 (1985).

89. *Atascadero*, 473 U.S. at 242.

90. Eskridge & Frickey, *supra* note 74, at 622.

91. *See, e.g.*, Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989). Authors Eskridge & Frickey also point out that a similarly strong clear statement rule has been applied to issues of whether States have waived their Constitutional immunity. *See* Eskridge & Frickey, *supra* note 74, at 622.

92. 469 U.S. 528, 530 (1985).

93. 426 U.S. 833 (1976).

94. *See id.* at 845, 854.

95. *See id.*

96. *Garcia*, 469 U.S. at 530.

97. *Id.*

federalism.[98] According to the Court, "[s]tates occupy a special and specific position in our constitutional system and . . . the Scope of Congress' authority under the Commerce Clause must reflect that position."[99] Nevertheless, the political process, rather than traditional Commerce Clause analysis, is the proper mechanism by which to accord states due protection.[100] The Supreme Court described the protection afforded by the political process as: "The principle and basic limit on the federal commerce power is that inherent in all congressional action – the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated."[101] Thus, in the mid-1980s, the Supreme Court moved away from applying traditional Commerce Clause analysis to guard against overreaching federal regulation and toward deferring such decisions to the people, through the political process. In the subsequent Eleventh Amendment immunity and state waiver cases, the Supreme Court ensured that Congress intended to frustrate the federal-state balance of power by requiring Congress to include a clear statement of its intent in the text of a statute.[102]

b. The 1990s

In the early 1990s, the Supreme Court expanded the scope of the federalism-based clear statement rules in its decision of *Gregory v. Ashcroft*.[103] The Court applied a clear statement rule to determine the application of a statute involving a core state function.[104] Specifically, the issue in *Gregory* was whether a provision of the Missouri Constitution,

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98. *See id.* at 531.

99. *Id.* at 556.

100. *See id.*

101. *Garcia*, 469 U.S. at 556.

102. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 464 (1991); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985). This change has been characterized as: "[J]udicial restraint at the constitutional level, [to] judicial activism at the interpretive level." Eskridege & Frickey, *supra* note 74, at 623.

103. 501 U.S. 452 (1991).

104. Congress expressly extended the ADEA to the states in 1974 and therefore, there was no question that States could be sued under the Act. *See* 29 U.S.C. § 630(b)(2) (1994). According to Justice White's dissent in *Gregory*, the only dispute in the case was "over the precise details of the [ADEA's] application. We have never extended the plain statement approach that far, and the majority offers no compelling reason for doing so." *Gregory*, 501 U.S. at 476.

which provided a mandatory retirement age of seventy for most state judges,[105] violated the federal ADEA.[106]

The Court began its analysis with a lengthy discussion of the functioning of the dual system of government, and the importance of maintaining the integrity of the system.[107] The Court noted that the power of the federal government is constrained.[108] Specifically, the federal government's power is limited by the Tenth Amendment to the Constitution, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[109] Therefore, if the federal government wishes to act, it must find the authority to do so within the Constitution.[110] However, the Supreme Court, quoting James Madison, noted that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[111]

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105. The Missouri Constitution provides that "all judges other than municipal judges shall retire at the age of seventy years." MO. CONST. art. V, § 26.

106. *See* 29 U.S.C. §§ 621-634. The other issue in *Gregory* was whether the Missouri constitutional provision violated the Fourteenth Amendment Equal Protection Clause. *See Gregory*, 501 U.S. at 456. For purposes of this Comment, the only relevant query is whether the Missouri Constitution violated the ADEA.

107. *See Gregory*, 501 U.S. at 457. The Court's description of the dual system of government is:

> 'The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' . . . 'Without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not reasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Id. (citations omitted).

108. *See id.*

109. U.S. CONST. amend. X.

110. The Court in *Gregory* did not have to decide whether Congress had the constitutional authority under the Commerce Clause to apply the ADEA to state appointed judges because the requirements of the clear statement rule were not met. *See Gregory*, 501 U.S. at 464. Thus, applying the rule in certain instances will avoid constitutional problems.

111. *Id.* at 458 (citing The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

In this balance of powers, the Supreme Court acknowledged that the Supremacy Clause affords the federal government an advantage over the states.[112] Where the federal government acts pursuant to its authority under the Constitution, its actions are supreme to any state action. Thus, the federal government may even regulate areas traditionally reserved to the states.[113] However, the Court pointed out several advantages of our dual sovereigns system of government.[114] According to the Court, the most important advantage of the dual powers is that our system serves as a check on potential abuses of power.[115] Therefore, the Court stated that Congress' ability to impose its wishes on the states is "an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly."[116]

The Court went on to state that the Missouri provision establishing a qualification for its judges "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."[117] The Court analogized the situation presented in *Gregory* to a line of Supreme Court cases dealing with the degree to which the Equal Protection Clause of the Fourteenth Amendment restricts a state from prohibiting aliens from gaining public employment.[118] In these cases, the Court held that decisions that "go to the heart of representative government" are unique in nature, and while the Equal Protection Clause poses a check on state power to exclude aliens from service, the standard of

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112. *See id.* at 458.

113. *See Gregory*, 501 U.S. at 460.

114. *Id.* at 458. The Court articulated the following benefits:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id. For a greater discussion on the advantages of our dual system of government *see generally* Merrit, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988).

115. *See Gregory*, 501 U.S. at 458.

116. *Id.* at 460.

117. *Id.*

118. *See id.* at 461.

reviewing exclusions will be lowered because of this unique function.[119] According to the *Gregory* Court, "[t]hese cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at 'the heart of representative government.' It is a power reserved to the States under the Tenth Amendment . . . ."[120]

Nevertheless, the Gregory Court acknowledged that the people's rights to determine the qualifications of their government officials is limited, and Congress may have authority to regulate in this area.[121] Yet, because of the *Garcia* decision, the Court stated that it was "constrained in [its] ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause."[122] Instead, the Court applied the clear statement rule to ensure that Congress intended to apply the ADEA to state appointed judges.[123]

The ADEA prohibits an employer from terminating "any individual" from service who is at least forty years of age "because of such individual's age."[124] An "employer" includes "a State or local political subdivision of a State . . . ."[125] The term "employee" is defined as "an individual employed by any employer except that the term 'employee' shall not include . . . an appointee on the policy making level."[126]

The Court concluded that the statute was ambiguous in its application to appointed state judges because it was unclear whether appointed judges fell within the "appointee on the policy making level" exception of the statute.[127] The Court stated that the exception was broad enough that the Court could not conclude that Congress intended state appointed

119. *See* Sugarman v. Dougall, 413 U.S. 634, 648 (1973). In this case, the Court stated that "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Id.* This "political function" exception was expanded to positions which are "intimately related to the process of democratic self-government." Bernal v. Fainter, 467 U.S. 216, 220 (1984).

120. *Gregory*, 501 U.S. at 463.

121. *See id.*

122. *Id.* at 464.

123. *See id.*

124. 29 U.S.C. §§ 623(a)(1), 631(a) (1995).

125. *Id.* § 630(b)(2). Prior to the 1974 ADEA amendment, states were not considered employers subject to the Act. *See Gregory*, 501 U.S. at 464.

126. 29 U.S.C. § 630(f). This exception followed the inclusion of a state within the definition of employer. *See Gregory*, 501 U.S. at 464.

127. *See Gregory*, 501 U.S. at 467.

judges to be covered by the ADEA. The Court applied the clear statement rule to interpret the ambiguity and held that the ADEA does not apply to state appointed judges.[128] The Court also mentioned that the Act did not need to list judges explicitly in order to include them.[129]

B. The Statutory Language of Title II

1. Does the Definition of "Public Entity" Create Ambiguity?

The *Gregory* decision left two primary issues unresolved: First, which state functions trigger the application of the clear statement rule; second, what is the level of clarity Congress must have in order to rebut the presumption of non-interference? Both of these issues arose in the debate among the Circuit Courts when considering whether the ADA applies to inmates in state prisons. Each of the courts accepted that the management of state prisons is a core state function.[130] Rather, the debate focused on whether the language in Title II is ambiguous.

The *Gregory* decision provides an example of the application of the clear statement rule to ambiguous statutory language. *Gregory* also establishes that there is no requirement for Congress to list each state agency covered in a statute or each activity Congress intends to regulate in order to preempt state statutes.[131] Thus, the line between clarity and

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128. *See id.*

129. *See id.*

130. The courts did not question whether the administration of state prisons is a core state function. It is unclear after *Gregory* whether the function is a core state function triggering the application of the clear statement rule. The Supreme Court phrased the clear statement rule in *Gregory* in broad terms. *See id.* at 460-61. The rule requires Congress to make its intentions to frustrate the federal-state balance of power unmistakably clear in the text of the statute. *See id.* With such a broad rule, it is quite possible that the clear statement rule governs all issues involving essential state functions. Nevertheless, in *Gregory*, the Court was faced with determining the qualifications of public officials, which "go[es] to the heart of representative government." *Id.* at 461. Specifically, the Court stated that the function "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity." *Id.* at 460. This may suggest that the Supreme Court is more concerned with preserving state control over issues of representative government. Unfortunately, however, with only one Supreme Court case providing guidance on this issue, it is difficult to definitively determine which core state functions warrant use of the rule.

131. *See id.* at 467.

ambiguity is somewhere between listing each entity, and providing a general definition with a broad exception, as in *Gregory*. The Circuit Courts that interpreted Title II had to determine where the Title's statutory language falls within that spectrum.

Title II covers "public entities" which is broadly defined to include "any" state government or instrumentality thereof.[132] Furthermore, Title II does not contain any exceptions to the term "public entity" that would exclude certain state agencies from the purview of the statute. Because the definition of a "public entity" is broad, the question arose concerning whether broad statutory language is ambiguous.

The Third, Seventh, and Ninth Circuits concluded that the broad definition of a "public entity" unambiguously expresses congressional intent to cover all state and local government agencies, including state prisons.[133] These courts focused on the use of the word "any" in relation to state government entities and the lack of any modifier that would exclude certain state entities from coverage. In addition, the Ninth Circuit and the dissent in *Amos* distinguished the language of Title II from that of the ADEA and concluded that the clear statement rule does not apply.[134] However, the Fourth Circuit in *Amos* concluded that the breadth of the ADA renders it ambiguous in relation to state prisons and prisoners.[135] In reaching this conclusion, the court compared the statutory language of the ADA and the ADEA, and found them to be indistinguishable.[136] Thus, the argument was whether the language in the ADA was comparable to the language in the ADEA, which the Supreme Court determined to be ambiguous.

In *Gregory*, the Court was interpreting a statute containing a broad exception. Conversely, the courts interpreting Title II were confronted with a broad statutory provision with no exceptions. In other words, the ADEA contains a broad exception, while Title II is a broad statute.[137]

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132. See *supra* Part III, subsection B for the definition of a "public entity."

133. Armstrong v. Wilson, 124 F.3d 1019, 1023 (9th Cir. 1997); Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168, 170 (3rd Cir. 1997); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 485 (7th Cir. 1997).

134. *See Armstrong*, 124 F.3d at 1024.

135. *See* Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589, 605 (4th Cir. 1997).

136. *See id.*

137. The Ninth Circuit noted the following difference: "In contrast to the ADEA, which expressly excludes most high-ranking public officials from its reach, the ADA . . . appl[ies] to 'any' and 'all' state entities and operations without exclu-

This is a significant difference. In the case of a broad exception, as in the ADEA, it is clear, at the outset, that Congress does not intend the statute to apply to all individuals because it included the exception. If the exception is broad, there will likely be confusion regarding the coverage of certain entities by the statute, possibly rendering the statute ambiguous.

On the other hand, a broad statute, particularly one that covers "any" particular class of entities or individuals without exception, can be distinguished from a statute such as the ADEA. With a broad statute, a court interprets the statute to comport with Congresses intention for it to apply to all entities.[138] Further, the language in Title II is very similar to the broad definition of "employer" used in the ADEA. In *Gregory*, the Supreme Court stated that "[w]here it is unambiguous that an employee does not fall within one of the exceptions, the Act states plainly and unequivocally that the employee is included."[139] The Act defines an "employer" to include "a State or political subdivision of a State . . ."[140] Thus, the Court said that if an employee did not fall within one of the exceptions, a public employer must adhere to the statute. Therefore, the broad definition of an "employer" is not ambiguous. If there had been no exception to the definition, the clear statement rule would not have applied because the rule is only applicable when there is ambiguous language. Thus, the definition of "public entity" seemed to unequivocally include state prisons.

Additionally, the Fourth Circuit's argument that the language in Title II is indistinguishable from the ambiguous language in the ADEA leaves Congress with no alternative but to list each entity to which a statute applied. It is difficult to imagine statutory language that would be less ambiguous than including the word "any," yet would not entail explicitly referring to state prisons in the Act. Congress might have been compelled to specifically list each entity to which a statute applies because

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sions." *Armstrong*, 124 F.3d at 1024 (citation omitted).

138. *See id.* In fact, the argument becomes stronger when one considers that Congress intentionally drafted the ADA to cover state action. Furthermore, Congress knew that core state functions would be regulated, yet it chose not to exclude them. *See id.* In addition, when one considers that Congress delegated the DOJ, an agency concerned with criminal justice, as the agency responsible for implementing Title II, this further lends support to the argument. *See* 42 U.S.C. § 12134(a) (1994).

139. Gregory v. Ashcroft, 501 U.S. 452, 467 (1991).

140. 29 U.S.C. § 630(b)(2) (1995).

the court in *Amos* did not provide any examples of satisfactory language. An enumeration requirement wastes legislative resources and is at odds with the *Gregory* decision.[141] The Supreme Court's decision in *Yeskey* remedied this problem.

The Fourth Circuit also raised the point that the term "public entity" itself creates ambiguity as to whether state prisons are required to adhere to the ADA. According to the court, the word "public" is fundamentally at odds with a state prison because a prison does not provide services to the public.[142] In fact, prisons exclude the public except under limited circumstances.[143] However, detaining criminals from society and attempting to rehabilitate them for their future return to society is a service provided to the public. In addition, if the term "public" was intended to exclude prisons, Title II would not protect disabled prison visitors, personnel, or attorneys. Such an application of Title II is absurd.

2. Does the Plain Meaning of the Term "Qualified Individual" Create Ambiguity?

In *Amos*, the Fourth Circuit concluded that the definition of a "qualified individual" creates ambiguity regarding whether Title II applies to inmates in State prisons.[144] The definition necessarily requires that "services," "programs," or "activities" be provided by the public entity. However, the court determined that a prison does not provide "services," "programs," or "activities" to its inmates because incarceration is not a "service," "program," or "activity."[145]

The Fourth Circuit also determined that the terms "eligible" and "par-

141. *See id.*

142. *See* Amos v. Maryland Dep't of Pub. Safety and Correctional Services, 126 F.3d 589, 596 (4th Cir. 1997). The court stated that "the name ascribed to Title II – 'Public Services' -- connotes a ban on discrimination in services provided to the public, not in the prison context where the public is excluded. State prisons thus do not fit neatly within the definition of 'public entities' to which the ADA applies." *Id.* (citation omitted).

143. Examples of public access to prisons include visitors during established visiting hours and prison personnel.

144. *See Amos*, 126 F.3d at 596.

145. *See id.* The Tenth Circuit also concluded that the definition of a "qualified individual" in the ADA and the Rehabilitation Act creates ambiguity. *See, e.g.*, White v. Colorado, 82 F.3d 364, 367 (10th Cir. 1996); Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991) ("The . . . Rehabilitation Act . . . does not give plaintiff any substantive rights since the Federal Bureau of Prisons does not fit the definition of 'programs or activities'. . . .").

ticipate" in the definition of a "qualified individual" create ambiguity because the words connote voluntary participation in, or receipt of, public services, programs or activities. The court concluded that prisoners do not voluntarily receive benefits.[146] In fact, the word "voluntary" is at odds with the nature of prisons.[147]

Although it seems ridiculous to think of incarceration as a "service," "program," or "activity" provided to prisoners, state prisons do provide certain services, programs, and activities as these terms are commonly understood.[148] For example, prisons often provide substance abuse programs, vocational training, medical services, and access to a prison library. Further, Title II contains no exceptions for certain services, programs, or activities that would justify treating those provided in prisons differently.

In addition, implying the condition of voluntariness from the terms "eligible" or "participate" is inconsistent with the text and purpose of the ADA.[149] The findings section of the ADA states that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization."[150] Certainly, by definition, institutionalized individuals are not free, and many of their decisions are not made voluntarily. Congress, however, did not intend that such individuals be excluded from being considered qualified individuals by virtue of their lack of freedom. In addition, implying an element of voluntariness has the effect of excluding other state services, programs, and activities that are mandatory, such as public education.[151] Therefore, a disabled child at-

146. *See Amos*, 126 F.3d at 596.

147. *See id.*

148. According to the Seventh Circuit, "[While] [i]ncarceration itself is hardly a 'program' or activity' to which a disabled person might wish access, . . . there is no doubt that an educational program is a program, and when it is provided by and in a state prison it is a program of a public entity." Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 483 (7th Cir. 1997) (citation omitted).

149. *See* Yeskey v. Pennsylvania. Dep't of Corrections, 118 F.3d 168, 173 (3rd Cir. 1997). In addition, the Third Circuit concluded that implying voluntariness from the terms is inconsistent with their plain meanings. The court stated that "[t]he terms 'eligibility' and 'participation' do not . . . imply voluntariness or mandate that an individual seek out or request a service to be covered. To the contrary, the term 'eligibility' simply describes those who are 'fitted or qualified to be chosen,' without regard to their own wishes." *Id.* (citation omitted) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 736 (1986)).

150. 42 U.S.C. § 12101(a)(3) (1995).

151. *See* Armstrong v. Wilson, 124 F.3d 1019 (9th Cir. 1997).

tending a public school would have no recourse under Title II of the ADA if the student were denied participation in a school activity based on his or her disability, because the student would not be considered a qualified individual. This result is not only absurd but is inconsistent with case law in certain jurisdictions.

V. PENNSYLVANIA DEPARTMENT OF CORRECTIONS V. YESKEY: THE ADA APPLIES TO INMATES IN STATE PRISONS

On June 15, 1998, the Supreme Court issued a decision in the case of *Pennsylvania Department of Corrections v. Yeskey*.[152] The unanimous Court ruled that the statutory language of Title II unmistakably covers inmates in state prisons.[153] Writing for the Court, Justice Scalia concluded that it was unnecessary to decide whether the clear statement rule governed the analysis.[154] Assuming *arguendo* that the rule applies, the Court decided that the rule is "amply met."

The Court distinguished the broad language of Title II, specifically, the expansive definition of a "public entity," from the language of the ADEA interpreted in *Gregory*.[155] According to the Court, the clear statement rule was not met in *Gregory* because the Court could not say, with certainty, that appointed state judges did not fall within the ADEA's exception for an "appointee on the policy making level." In other words, there was ambiguity regarding the coverage of employees under the policy making exception. However, the Court concluded that there was no ambiguity regarding whether Title II covers State prisons and prisoners because "State prisons fall squarely within the statutory definition of 'public entity.'"[156] In addition, Title II does not contain any exception for certain state entities that would lead the Court to question whether State prisons fell within the exception.

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152. 118 S. Ct. 1952 (1998).

153. *See id.* at 1956.

154. *See id.* at 1954.

155. *See id.* The Court stated the distinction between the cases as:

> The situation here is not comparable to that in *Gregory*. There, although the ADEA plainly covered state employees, it contained an exception for 'appointee[s] on the policy making level' which made it impossible for us to 'conclude that the statute plainly cover[ed] appointed state judges.' Here, the ADA plainly covers state institutions without any exception that could cast the coverage of prisons into doubt.

Id. (footnote omitted).

156. *Yeskey*, 118 S.Ct. at 1954.

The Court also concluded that the definition of a "qualified individual with a disability" does not create ambiguity as to whether the ADA applies to prisoners.[157] First, the terms "services," "programs," or "activities" do not create ambiguity because "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs' . . . ."[158] In addition, there is nothing in the statute itself that justifies distinguishing the programs and activities provided in prisons from those provided by other state entities.[159] Second, the terms "eligibility" and "participation" do not create ambiguity because the words do not imply voluntariness.[160] However, assuming *arguendo* that the words connote voluntary participation, the Court noted that prisons offer voluntary activities and programs, such as the use of a prison library.[161]

Furthermore, the Court questioned the petitioners' argument that the lack of reference to prisons in the statute's findings section creates ambiguity because the section refers to institutionalization.[162] Additionally, assuming that the findings do not refer to prisons, the Court still found the argument unpersuasive. According to the Court, "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"[163]

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157. *See id.* at 1955.

158. *Id.*

159. *See id.*

160. *See id.* The Court points out that Webster's New International Dictionary defines "eligible" as "[f]itted or qualified to be chosen or elected; legally or morally suitable; as, an *eligible* candidate" and "participate" as "[t]o have a share in common with others; to partake; share, as in a debate." *Id.* The Court provides the following example of how one might be eligible to participate in an involuntary program:

> While "eligible" individuals "participate" voluntarily in many programs, services, and activities, there are others for which they are "eligible" in which participation is mandatory. A drug addict convicted of drug possession, for example, might, as part of his sentence, be required to "participate" in a drug treatment program for which only addicts are "eligible."

Id. (citation omitted).

161. *See Yeskey*, 118 S.Ct. at 1955. In fact, the Court emphasized that participation in the Boot Camp program at issue in *Yeskey* was voluntary. *See id.*

162. 42 U.S.C. § 12101(a)(3) (1994).

163. *Yeskey*, 118 S. Ct. at 1956 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

VI. COMMENT

The *Gregory* decision provides an example of the clear statement presumption operating to interpret ambiguous statutory language. Additionally, the decision reinforces that Congress has the ability to preempt certain state actions, even those traditionally within the state sphere. Congress need only have the constitutional authority to do so and make its intentions clear in the text of a statute. The decision does not, however, resolve the critical question of the level of clarity required in federal statutory language to preempt state action.

Gregory left the Circuit Courts to resolve whether the ADA applies to state prisoners without clear guidelines, or examples, of what constitutes clear language. The courts, in turn, made decisions based on their concern for preserving federalism. Thus, the debate appeared to center on political issues, rather than on whether Congress intended the ADA to apply to state prisons.

Fortunately, the Supreme Court's decision in *Yeskey* provides an example of unambiguous statutory language that permits Congress to regulate a core state function. Courts presented with interpreting federal statutes now have an example of both ambiguous and unambiguous statutory language. Thus, in the future, there may be greater consistency in the law because courts have less discretion to allow federalism concerns to guide their decisions. Nevertheless, because the Supreme Court held that the clear statement rule is amply met, the decision leaves room for debate. It is possible that a situation may arise in which the rule would be met, but less convincingly. In that situation, the courts are likely to be split regarding the clarity required of Congress to regulate an essential state function. The impetus of the disagreement would be a court's opinion concerning the role of the federal government in our two-tier system of government. However, the decision provides an example of the type of statutory language that, if subject to the clear statement rule, would be sufficiently clear to allow Congress to preempt state regulation under the Supremacy Clause. After the *Yeskey* decision, a court confronting comparable statutory language would be hard pressed to find such language ambiguous.

The *Yeskey* decision also reinforces the fact that there is no requirement for Congress to list each entity to which a statute applies in order to meet the demands of the clear statement rule. While the issue was resolved in *Gregory*, the Fourth Circuit's decision in *Amos* left many questioning what Congress could have done to clearly express its inten-

tion to apply the ADA in state prisons. Perhaps there was no way to satisfy the court other than an express statement from Congress that state prisons were required to adhere to the ADA. If the Supreme Court had agreed with the Fourth Circuit, Congress would be forced to enumerate each entity covered under a statute. Requiring Congress to legislate in such a way has many foreseeable negative consequences. First, it would be a waste of legislative resources, both in terms of time, and money. Second, there would be a distinct possibility that Congress could mistakenly fail to include an entity in the statute. In this case, Congress would be forced to either amend the statute, which further depletes Congress' resources, or decide to forego amending the statute, which would harm a group of individuals that do not have the political power to lobby for amending the statute.[164] Thus, the Supreme Court's decision that the language in Title II unmistakably applies to state prisons and prisoners furthers several policies. These policies include the containment of legislative costs; the assurance that individuals intended to benefit from a statute are not unintentionally excluded; and the ability of Congress to exercise its constitutional authority to preempt certain state functions without unnecessary constraints.

By assuming, without deciding, the issue of whether the clear statement rule governs the analysis, the *Yeskey* decision does not offer much guidance on which state functions trigger use of the rule. It may be that the clear statement rule only applies to state functions involving representative government, as in *Gregory*. On the other hand, the Supreme Court in *Gregory* may not have intended such a limited scope of the rule. Perhaps, the Court simply pointed out the importance of state interest in determining the qualifications of its judges.

It is foreseeable that this issue could resurface in two situations. First, a future decision may involve congressional regulation of state prisons

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164. *See* Michael P. Lee, *How Clear is "Clear"?: A Lenient Interpretation of the Gregory v. Ashcroft Clear Statement Rule*, 65 U. CHI. L. REV. 255, 257-58, 260-61 (1998). The author puts forth the following argument:

> Enumeration increases both legislative decision costs, because it is costly for Congress to list the entire range of functions it intends to regulate, and error costs, because Congress may err by neglecting to include a function it intended to affect. In addition, while the clear statement rule is intended to increase decision costs by forcing congressional deliberation, these costs may lead to legislative paralysis. If Congress knows that it must enumerate every state function it wishes to regulate, it may be deterred from initiating important legislative efforts.

Id. at 257-58.

in the context of different legislation. Second, there are potentially many essential state functions that Congress may attempt to regulate. In both situations, a court might not be able to avoid determining which state functions trigger the clear statement rule and which is analyzed under traditional rules of statutory construction. Thus, it is important to examine both the *Gregory* and *Yeskey* decisions for any indication as to when the rule applies.

Although the decisions in *Gregory* and *Yeskey* would not be dispositive in either situation, they offer some guidance. If the Supreme Court in *Gregory* had only intended the rule to apply in situations involving functions "going to the heart of representative government,"[165] it is likely that the Court would have phrased the rule in those terms. Instead, the Court chose to use very broad terms. As espoused in *Gregory*, the rule applies when the federal-state balance of power would be frustrated. The traditional constitutional balance of power is upset in many situations outside of those involving functions of representative government. In addition, after the Court's decision in *Garcia*, the Court may rely more heavily on the clear statement rule to protect the federal-state balance of power and the integrity of our dual sovereign system of government. Thus, while the Supreme Court is going to defer Commerce Clause issues to the political process, it also requires Congress to speak clearly if it intends to regulate core state functions. If the Supreme Court applies the clear statement rule to more functions than those involving representative government, the Court is better able to guard against unintended, potentially unconstitutional federal intrusions into the state sphere and preserve our system of government.

This projection is supported by the Court's decision in *Yeskey*. Although the Court does not state definitively that the rule would have applied if the statutory language had been ambiguous, the Court does suggest such a conclusion. The Court does so by pointing out the importance of the preservation of societal order and the state interest in the maintenance of its prisons. According to the Court: "One of the primary functions of government . . . is the preservation of societal order through enforcement of criminal law, and the maintenance of penal institutions is an essential part of that task."[166]

Despite the Supreme Court's ruling, there is still some question as to the practical effect of the decision. First, the petitioners in *Yeskey* raised

165. Gregory v. Ashcroft, 501 U.S. 452, 463 (1991).
166. *Yeskey*, 118 S. Ct. at 1954.

the argument that Congress exceeded the scope of its power under both the Commerce Clause and Section five of the Fourteenth Amendment.[167] The Court did not address these issues because the petitioners did not raise them in the lower courts. A future defendant may properly raise the issue, thus leaving a court to decide it at a later date.[168]

This may not be a concern to some. However, it is important to note that this is not an issue of whether prisoners ought to be provided with services or programs. As a society, and as taxpayers funding these programs, we may decide that there is no justification for providing prison programs. However, once a decision has been made to offer such activities and programs, the intention of Congress to apply the ADA even to criminals is clear. One could not legitimize a decision to treat prisoners differently solely on the basis of their disability, any more than one could rationalize treating prisoners of different races or genders disparately.

The second issue that may resurface is how the ADA will be applied in the prison setting. For example, Judge Posner, writing for the majority in *Crawford*, raised the issue that the possible defenses that no reasonable accommodation exists, or that the accommodation poses an undue burden, will be less stringent to meet in a prison.[169] He stated that "[t]erms like 'reasonable' and 'undue' are relative to circumstances, and the circumstances of a prison are different from those of a school, an office, or a factory."[170] In fact, the Supreme Court made a similar conclusion in relation to a prisoner's liberty interest in marriage in *Turner v. Safley*.[171] In *Turner*, the Court set forth a four-part reasonableness test that weighed a prisoner's liberty interest in marriage against the prison's interests in prison management.[172] The factors the Court considered gave deference to the strong interests that a prison has in security. Therefore, the Court acknowledged that reasonableness may depend on the circumstances, and that the scope of prisoners' rights may be diminished while

167. *See id.* at 1956.

168. The United States Court of Appeals for the Eighth Circuit recently concluded that Congress had the constitutional authority to enact the ADA. *See* Alsbrook v. City of Maumelle, 1998 U.S. App. LEXIS 22112, at *12 (8th Cir. 1998).

169. *See* Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997).

170. *Id.*

171. 482 U.S. 78, 84-91 (1987).

172. *See id.*

they are incarcerated. Because the same interests are present in the application of the ADA to prisons, it is possible that a similar conclusion may be reached. However, this issue remains undecided.

VII. CONCLUSION

The Court's decision in *Yeskey* affords disabled inmates in state prisons protection against disability discrimination under the ADA. State prisons will no longer be permitted to discriminate against their prisoners on the basis of disability. The decision also clarifies the scope of the clear statement rule of statutory construction. It is clear after *Yeskey* that a broad federal statute, containing no exceptions, is not ambiguous. All Congress is required to do to legislate in a manner that frustrates the federal-state balance of power is to enact broad legislation that clearly covers a particular activity or class of entities. Such a requirement appears to strike a balance between preserving the states' traditional sovereign powers and affording due deference to the Supremacy Clause.

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